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**Issue Date: 12 October 2006**  
**CASE NO.: 2005-LDA-00062**

In the Matter of:

J.M.C., JR.,

Claimant,

v.

SERVICE EMPLOYERS INTERNATIONAL,

Employer,

and

INSURANCE COMPANY OF THE STATE  
OF PENN.,

Carrier.

Appearances:

William H. Haller, Esq.  
For the Claimant

Robert N. Dengler, Esq.  
For the Employer

Before: Stephen L. Purcell  
Administrative Law Judge

**DECISION AND ORDER — DENYING BENEFITS**

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901, *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* J.M.C., Jr. ("Claimant") is seeking compensation and medical benefits from Service Employers International ("Employer" or "SEI") and Insurance Company of the State of Pennsylvania ("Carrier") for an alleged work-related injury to

Claimant's right knee which left him temporarily totally disabled from February 10, 2005 through June 2, 2005.

A formal hearing was held in this case on September 21, 2005 in Fort Myers, Florida at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, Claimant offered Exhibits 1 through 10, which were admitted into evidence.<sup>1</sup> Employer offered Exhibits 1 through 5, which were also admitted into evidence at the hearing. Additionally, Administrative Law Judge Exhibits 1 through 3 were admitted into evidence without objection at the hearing. The record was held open after the hearing at the request of the parties. Claimant thereafter submitted Exhibits 11 and 12, and Employer submitted Exhibits 6 through 8; all of which are hereby admitted into evidence. Both parties subsequently filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## **I. STIPULATIONS**

The parties have stipulated and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at the time of the alleged injury.
3. Employer was timely notified of Claimant's alleged injury.
4. Claimant filed a timely claim.
5. Employer filed a timely first report of injury and Notice of Controversion.
6. Claimant was temporarily totally disabled on account of his right knee condition from February 10, 2005 through June 2, 2005.
7. No compensation or medical benefits have been paid to Claimant.
8. Claimant reached maximum medical improvement on June 2, 2005 and has a 9% permanent impairment of his right lower extremity.

ALJX 2-3; Tr. at 5-7.

## **II. ISSUES**

The following unresolved issues were presented by the parties:

1. Whether Claimant's injury arose out of and in the course and scope of Claimant's employment with Employer.
2. Claimant's average weekly wage at the time of the alleged injury.

ALJX 2-3; Tr. at 5-7.

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<sup>1</sup> The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

### III. STATEMENT OF THE CASE

#### Testimonial and Non-Medical Evidence

##### 1. Testimony of J.M.C., Jr.

Claimant testified at his hearing on September 21, 2005. Tr. at 25. On direct examination, he explained that he has worked mainly as a commercial plumber and an industrial plumber for most of his adult life. *Id.* at 26. He discussed his physical health, noting that he had never injured either of his knees or visited a health professional concerning his knees prior to December, 2004. *Id.* at 27. Claimant also stated that he never suffered arthritis in his right knee prior to December, 2004. *Id.* at 27-28.

During his testimony, Claimant said that he signed a contract with Employer, an affiliate of Kellogg Brown & Root (“KBR”), on September 30, 2004, to work as a plumber overseas. Tr. at 29. He stated that he was sent to Kandahar, Afghanistan in October, 2004 to work on a United States military base. *Id.* at 29-30. Claimant explained that he worked primarily on U.S. military facilities, and that the nature of his work was plumbing, as well as assisting carpenters, generator mechanics, and concrete workers. *Id.* at 31. He described his work as “mostly manual, with some paperwork,” and as being primarily outdoors. *Id.* at 33. He said his job involved heavy lifting, occasionally in excess of 75 pounds. *Id.* at 34. He further explained that he worked seven days per week, 12 hours per day. *Id.* at 31.

Claimant testified that he injured himself while working for Employer. Tr. at 34. He stated that he was first injured on approximately December 27, 2004. *Id.* Due to torrential rains and subsequent flooding, Claimant explained, his department was directed to place water extraction pumps at various low spots within a very rocky area. *Id.* According to Claimant, he was injured while moving an extraction hose that was connected to a water pump. *Id.* at 35. He testified that while standing in approximately ten inches of water in a rocky depression, he turned to his left, and then felt immediate pain in his right knee. *Id.*

According to Claimant, he spoke with Bradley Wilson, one of SEI’s employees, whom Claimant believed was a physician’s assistant. Tr. at 35-36. Claimant stated that he informed Mr. Wilson of his twisted and swollen knee. *Id.* at 36. He testified that Mr. Wilson instructed him to ice the knee, keep it elevated and to take “Naprosyn or Naproxen.” *Id.* According to Claimant, he never informed Mr. Wilson that he had a pre-existing condition in his right knee. *Id.* Claimant said that he missed one day of work because of this injury. *Id.*

Claimant went on to explain that shortly after his injury, he left Afghanistan to return to the U.S. for rest and relaxation (“R&R”). Tr. at 37. He departed Afghanistan on January 3, 2005, and returned sometime between January 21 and January 25, 2005. *Id.* at 37-38. Claimant testified that while in the U.S. he did not receive any medical treatment or consult a doctor or any other medical professional. *Id.* at 38. He said that upon returning to Afghanistan he could work without restrictions, although his right knee did not feel “perfect.” *Id.* at 38-39. Claimant

testified that after the initial injury in December, he tried to transfer to a less physically demanding unit; yet he was never re-assigned. *Id.* at 42-43.

Claimant further testified that he injured his right knee again on February 9, 2005.<sup>2</sup> Tr. at 39. He described the injury as follows: “It was pretty much the same scenario as the first time....We were still experiencing floods, intermittent floods throughout the area and I was back again on damage control duty dealing with pumps and sandbags again....I twisted [my knee] this time and I knew something was absolutely wrong.” *Id.* He said that he realized he was hurt when he felt his knee “pop.” *Id.* at 40. Although he did not fall down, he said that he “almost lost [his] footing.” *Id.*

According to Claimant, he reported the injury to his supervisor at the time, John Powell, and also to the medical attendant.<sup>3</sup> Tr. at 40. Claimant stated that he also reported his injury to one of Employer’s medical officers, John Allen. *Id.* at 41. He testified that he told Mr. Powell and Mr. Allen of his injury, and showed them his swollen knee. *Id.*

Claimant testified that he did not work in Afghanistan after February 9, 2005. Tr. at 41. According to Claimant, after the February 9<sup>th</sup> incident, he was not able to do the walking and lifting required for his job. *Id.* at 42. In fact, he stated that he was not able to perform his job at all. *Id.* He opted to return to the U.S., instead of going to Germany, for medical attention. *Id.*

Claimant explained that upon returning to the U.S., he went to Fort Myers and sought treatment from Dr. Springer, an orthopedic surgeon. Tr. at 44. He saw Dr. Springer for the first time on March 7, 2005. *Id.* Claimant testified that Dr. Springer examined him and speculated that Claimant had a possible torn meniscus and damage to his anterior cruciate ligament (“ACL”). *Id.* at 45. On May 4, 2005, Claimant underwent arthroscopic surgery on his right knee, performed by Dr. Springer. *Id.* Claimant testified that he had one month of physical therapy with Dr. Springer subsequent to his surgery. *Id.* at 46.

Claimant stated that his knee “works a lot better” now and that he no longer suffers from pain. Tr. at 46. He testified that he would like to return to Afghanistan to work again as a plumber for Employer. *Id.* at 47. Moreover, he asserted that he was ready to resume work in Afghanistan 90 days after his arrival in the U.S. *Id.*

As the direct examination ensued, Claimant was asked about Employer’s Exhibit 4, which includes documents suggesting that Claimant told several co-workers his knee injury was pre-existing. Tr. at 47-57. First, Claimant was shown an “Incident Reporting Form,” dated

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<sup>2</sup> Claimant explained that both alleged injuries he sustained, in December, 2004 and February, 2005, were “on main base Kandahar.” Tr. at 59. He testified that he worked outside the base approximately twenty (20) percent of the time while in Afghanistan. *Id.*

<sup>3</sup> Claimant stated that his supervisor when he first arrived in Kandahar was Norman Barnes. Tr. at 57-58. Charles Daniels (also known as Randy Daniels) was his supervisor at the time of his alleged December 27, 2004, injury. *Id.* at 40.

February 9, 2005 and completed by Bradley Wilson.<sup>4</sup> *Id.*; EX 4 at 105. In the report, which was submitted the day of Claimant's alleged second injury, Mr. Wilson noted that Claimant "requested a medical demob stating he is unable to perform the duties of his job due [to] the preexisting condition of chronic arthritis in his right knee." EX 4 at 105. In response, Claimant testified that he never told Mr. Wilson or anyone else that he had a pre-existing condition causing his right knee to hurt in February, 2005. Tr. at 48.

Claimant was then shown an email from Larry Dolence in KBR's Health and Safety Department, dated March 3, 2005. Tr. at 50; Ex 4 at 109-110. In the email, Mr. Dolence stated that on December 31, 2004 Claimant asked for Naproxen for chronic knee pain and did not mention any fall or injury. Tr. at 50; Ex 4 at 109. Claimant responded that he had never spoken with Mr. Dolence (nor did he know him personally), and that Mr. Dolence was not the person who dispensed the medication to him. Tr. at 50-51. According to Claimant, Bradley Wilson dispensed Claimant's Naproxen and, at that time, Claimant told Mr. Wilson that he had twisted his knee while working. *Id.* at 50-51.<sup>5</sup>

Next, Claimant was read a statement from Jack Savant, whom Claimant recognized as a security officer for the Forward Operating Bases division in Kandahar. Tr. 52. In the statement, Mr. Savant noted that he was present when Claimant was awakened one morning in early February, 2005. *Id.* at 53; EX 4 at 116. At that time, according to the statement, Claimant was complaining about his leg. *Id.*; EX 4 at 116. The statement further indicates that Claimant told Mr. Savant later that morning that "he had already had one knee taken care of and now needed the other knee operated on." EX 4 at 116. Mr. Savant's statement also noted that Claimant told him a doctor had extracted fluid from one of his knees while he was on R&R. *Id.*

Claimant replied that although he has been known by the nickname "Captain Jack," and though he recalled an incident in February, 2005 where Mr. Savant indeed woke him up, he did not believe that he complained about his leg at the time. Tr. at 54. Claimant testified that in early February, 2005, he had no severe pain in his leg or knee. *Id.* He said that he would "get a twinge every once in a great while" due to his December, 2004 injury, but that he did not complain about his knee or leg in early February, 2005. *Id.* Claimant also denied telling Mr. Savant that he had fluid extracted from his knee while on R&R. *Id.* He further asserted that he never told Mr. Savant that he had one knee taken care of and needed surgery on the other. *Id.*

Claimant was next asked about his former supervisor in Kandahar, Charles Daniels, also known as Randy Daniels. Tr. at 55. He stated that he worked for Mr. Daniels beginning in December 2004, at approximately the time he first hurt his knee. *Id.* Claimant testified that he never told Mr. Daniels that he had bad knees or other prior injuries. *Id.*

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<sup>4</sup> Mr. Wilson is the physician's assistant to whom Claimant allegedly reported his initial injury on December 27, 2004. *See supra* p. 3.

<sup>5</sup> At this point in his testimony, Claimant reiterated that he did not tell anyone at Service Employers or related to Service Employers "or anybody anywhere" that he had surgery on his knee and that his knee was drained while he was on R&R in January of 2005. Tr. at 51. In addition, Claimant denied telling anybody at any time that he received cortisone for his knee and that he brought knee braces back with him from his R&R. *Id.*

When asked if he knew Samuel Moore, Claimant stated that Mr. Moore was a department supervisor at Kandahar who he had seen at the medical tent a few times. Tr. at 56. Claimant testified that he did not tell Mr. Moore that he had problems with his knee for years; nor did he tell Mr. Moore that he would have to have fluid removed from his knee. *Id.* at 56-57.

On cross-examination, Claimant noted that he would not rule out the possibility that co-workers, in attributing statements to him, may have confused him with someone else. Tr. at 61. He conceded that he does wear an eye patch on his right eye, such that he was known as “Captain Jack,” and that his unique appearance makes him “stick out like a sore thumb at times.” *Id.* at 61-62.<sup>6</sup> When asked whether he also had a unique personality and had been a radio personality during his career, Claimant testified that he had done character voices on the radio. *Id.* at 62.

Claimant stated that he worked fairly closely with Randy Daniels. Tr. at 62. He testified that he did not, however, spend a lot of time with Samuel Moore. Tr. at 63-64. He asserted that he did not discuss any pre-existing knee problems with Mr. Moore, or ask to borrow ice from him; but that Mr. Moore had told Claimant of his own health problems. *Id.* at 63. Claimant further testified that he did not complain of knee pain to Jack Savant, when Mr. Savant awakened Claimant the first week of February, 2005. *Id.* at 64.

Claimant acknowledged that in an earlier deposition, he stated that he made a complete recovery from his December 2004 knee injury before he injured the same knee again. Tr. at 64-65. He testified at the hearing that when he returned to Kandahar in January 2005, the swelling from the December 2004 knee injury was completely down. *Id.* at 65. However, he stated that “after that time in the course of my normal duties and walking as far distances as I had over that rough terrain, every once in a while there would be some irritation, yes, and I did keep up with the regimen of medication that the medical, Brad Wilson [gave me].” *Id.* Claimant testified that Mr. Wilson gave him anti-inflammatory medication on February 6, 2005. Tr. at 66. He further reiterated that he never told Mr. Wilson he had chronic knee pain. *Id.*

Claimant testified that the two injuries he suffered were relatively similar, in that they both resulted from standing in a depression and twisting a knee. *Id.* at 66-67. He stated that he did not tell Dr. Springer that he was walking on uneven, rocky terrain when the incidents occurred. Tr. at 67. He noted that he took a day off after his December 27, 2004 injury, but that it was not related to his injury. *Id.* at 69.

Claimant further testified that he saw Brad Wilson on December 27th, the day of the injury, then four days later on December 31<sup>st</sup>. Tr. at 70. Asked whether he had an explanation as to why there was no record of Claimant attending the health clinic on December 27<sup>th</sup>, Claimant responded that he did not have one. *Id.* Claimant was then asked whether he claimed to have arthritic pain in his knees during his December 31<sup>st</sup> visit to the clinic. *Id.* He said that he did not make that claim. *Id.*

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<sup>6</sup> Claimant testified that he normally wears a black eye patch, but while in Afghanistan, he usually wore an adhesive patch while working, instead of a black eye patch, due to a limited movement of his eyelid and protection from dust. *Id.* at 61-62.

Claimant agreed that the work he did in Afghanistan was heavy, labor-oriented work. Tr. at 71. He acknowledged that he informed Employer in December, 2004 that he wanted to perform work in a more technical, less labor-oriented area. *Id.* He stated that he was happy, however, with his assignment to the Forward Operating Bases division. *Id.* at 72.

Claimant was asked about the supervisor to whom he reported his December, 2004 injury. Tr. at 74-75. He explained that he formally reported his injury to Randy Daniels, but that Mr. Barnes also found out about it. *Id.* at 75. Claimant said that he cannot explain why Randy Daniels stated he was unaware Claimant was hurt. *Id.* at 76. Claimant then alleged that he filled out a “handwritten statement” explaining what happened in connection with his December 27, 2004 injury on the same day the incident occurred. *Id.* He agreed that he reported the February, 2005 injury to John Powell. *Id.* at 75-76. Claimant testified that he believed he saw John Allen for medical attention after the February injury, and that Mr. Wilson may also have been in attendance at the time. *Id.* at 76.

When asked whether he misrepresented any facts regarding his employment history in his application for the job with KBR, Claimant answered that he did not believe he did so. Tr. at 77. Claimant testified that he lost a past job with U.S. Bank Corporation for “non-disclosure,” in that he did not reveal a driving while intoxicated charge from 1985. *Id.* Claimant was then shown a “Work History” form from his KBR job application. *Id.* at 78. He acknowledged that he had listed on the form that his “reason for leaving” the U.S. Bank Corporation job was for “higher wages.” *Id.* at 79.

Claimant testified that he worked for Western State Hospital in Hopkinsville, Kentucky for close to three years beginning in 1999; and his annual salary was less than \$17,000 gross per year. Tr. at 80. After that, he re-located to Minnesota where he worked for U.S. Bank Corporation. *Id.* at 81. His average annual salary then was approximately \$58,000 per year. *Id.* After Claimant was terminated from U.S. Bank Corporation, he worked for a company called Solutions for Operations and Maintenance in New Brighton, Minnesota. *Id.* He earned approximately \$40,000 to \$45,000 per year there. *Id.* He then held a job at Innovex for approximately five to eight months, and then went back to Kentucky and took the job with KBR. *Id.* at 82.

Claimant testified again on cross examination that at the time of the hearing, his knee felt normal. Tr. at 83. He stated that he had full range of motion in his knee all the way to his chest. *Id.* He noted that his knee “pretty much” felt like an 18 year-old’s knee. *Id.*

On redirect examination, Claimant stated that there was friction between he and Mr. Moore. Tr. at 84. He claimed the reason for the ill will was that Claimant had found Mr. Moore asleep in his truck while on the job. *See id.* Claimant testified that he “read him [Mr. Moore] the riot act” and that he sensed antagonism from Mr. Moore “constantly” afterwards. *Id.* at 85.

Claimant also reiterated on redirect examination that he sought treatment for his December 27, 2004 injury that same day. Tr. at 85. He stated that he had four supervisors during the time he worked for Employer. *Id.* According to Claimant, the reason for this number of supervisors was that he frequently changed departments. *Id.* He also stated that personnel “rotate

in and out of there all the time whether they'd be going on R&R or end of contract or they're medically [demobilized]." *Id.*

Subsequent to the hearing, Claimant was deposed on April 5, 2006. CX 12. He was asked about his visits to the Veterans Administration Hospital in St. Cloud, Minnesota on May 19<sup>th</sup>, June 2<sup>nd</sup> and June 7<sup>th</sup> of 2004 in order to get paperwork completed for unemployment compensation benefits. *Id.* at 4; EX 7. Claimant testified that he went to the hospital because he had recently lost his job with Innovex and he needed "to secure reasoning for the collection of unemployment benefits from the State of Minnesota."<sup>7</sup> *Id.*

Claimant admitted that he told the Veterans Administration Hospital on May 19<sup>th</sup> that he was fired from his job due to having migraine headaches; yet, that was not the reason for his dismissal. CX 12 at 6. He claimed that "under any other reasoning" he would not have been able to collect unemployment benefits. *Id.* Claimant further testified that on June 2<sup>nd</sup>, he reported to the hospital that he had lost his job because his right knee had swelled and that he needed to miss work. *Id.* at 6-7. He stated that the story was fabricated because he "needed a medical excuse to be able to collect unemployment." *Id.* at 7. He further testified that he did not have any trouble with his right knee at that time that required medical care. *Id.* He said that he had to walk "a lot" at work and that he had swelling in his right knee "at one point," but he did not seek any treatment for it. *Id.*

Next, Claimant was asked whether his testimony at the hearing was correct, regarding his statement that he never received medical treatment for his knees before injuring himself in Afghanistan in December, 2004. CX 12 at 7. Claimant responded that the testimony was correct; he did have muscle strains and sprains throughout his life, but none that were severe enough to require medical attention. *Id.* at 7-8. He acknowledged that his knee swelled in the spring of 2004 while he was working at Innovex, but reiterated that medical attention was not necessary. *Id.* at 8.

Claimant was then questioned about the required physical exam he passed when he began his employment with KBR. CX 12 at 9. He stated that he had to undergo "a series of squats, bends at the waist to touch the toes, twisting from the waist while standing..." and other tests. *Id.* He further testified that prior to his December 27, 2004 injury his knee was not bothering him, nor did it interfere with his ability to do his work in Afghanistan. *Id.*

On cross-examination, Claimant was questioned about his reasons for leaving Innovex, his employer directly prior to KBR. CX 12 at 11. Claimant had listed on his employment application that he left Innovex because the "company outsourced production." *Id.* at 12; EX 3 at 83. When questioned, however, Claimant admitted that he was actually fired from Innovex because he failed to report for work. CX 12 at 13. Claimant also admitted that he "lied" again when he told a staff person at the V.A. hospital in May, 2004 that he was fired from another employer for missing work due to migraine headaches. *Id.* at 14, 17. Claimant further testified that he "lied" a third time when he told the V.A. hospital in June, 2004 that he was fired from his job because of his knee condition. *Id.* at 14-15. Claimant testified that he was unemployed and

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<sup>7</sup> Claimant explained that he was fired for a "no call no show." CX 12 at 5.

“broke,” and that it was difficult to find jobs in his line of work at that point; he admitted he “lied to get benefits.” *Id.* at 21.

Claimant was also questioned on cross-examination about his past history of swelling in his right knee. CX 12 at 21. He said he experienced swelling in both knees at “many times” all throughout his life. *Id.* at 22. He further testified that there was a “good possibility” that he had swelling in his right knee in the spring of 2004. *Id.* However, Claimant reiterated that he never “had any diagnosis or any kind of reason to go and see a medical professional for either one of my knees.” *Id.* at 27. When asked whether he went to the V.A. hospital in May and June of 2004 complaining of a swollen right knee, Claimant said that his knee was not the main reason he went to the hospital. *Id.* at 24. He claimed that he went to the hospital “to gain paperwork” for unemployment benefits.” *Id.* Claimant stated, “I probably did have a swollen right knee at one time, but probably not at the time when I even walked into that hospital.” *Id.* at 25.

## 2. Statements of Larry Dolence

Larry Dolence authored numerous emails discussing Claimant’s medical condition. EX 4. In one email, Mr. Dolence stated that when Claimant started working for KBR, he had “pre-existing, chronic arthritis in his right knee.” *Id.* at 104. He stated that Claimant received cortisone shots in his knee while on his first R&R. *Id.*

Mr. Dolence sent another email, dated March 3, 2005, in which he explained that on December 31, 2004 Claimant came to the aid station for chronic knee pain, without mentioning a fall or injury. *Id.* at 109. He stated that upon returning from R&R on January 5, 2005, Claimant reported that he had arthroscopic surgery, had his knee drained, and received a cortisone shot. *Id.* He noted that Claimant also returned with knee braces. *Id.* Mr. Dolence wrote that Claimant returned for medical treatment on February 6, 2005, complaining of chronic knee pain. *Id.* He stated that Claimant was hours late for work on February 5, 2005, and he was awoken by a security coordinator. *Id.* at 110. At the time, Claimant complained that his knee hurt. *Id.*

## 3. Statement of Jack Savant

Jack Savant completed an “Accident/Incident Statement” on March 19, 2005. EX 4 at 116. He stated that he awakened Claimant one morning between February 5, 2005 and February 9, 2005, and Claimant complained about his leg. *Id.* Mr. Savant also said that Claimant told him that a doctor had extracted fluid from his knee while he was on R&R. *Id.*

Mr. Savant wrote that Claimant went to KBR’s medic, “and a few days later was in a [demobilized] status” to get his knees taken care of. EX 4 at 116. He said Claimant, told him that he “already had one knee taken care of and now needed the other knee operated on.” *Id.*

## 4. Statement and Deposition of Randy Daniels

Randy Daniels completed an “Accident/Incident Statement” on April 15, 2005. EX 4 at 117. Mr. Daniels stated that he met Claimant briefly after arriving in Kandahar in December, 2004. *Id.* He noted that Claimant had been transferred into his plumbing department. *Id.*

Mr. Daniels wrote that Claimant had been in an accident “a few years prior and had some previous injuries,” including “bad knees.” EX 4 at 117. He stated that he tried to give Claimant “less physically active tasks” for that reason. *Id.* He further noted that Claimant took a couple of days off prior to going on his first R&R, because his knees were bothering him. *Id.* He stated that after returning from R&R, Claimant was transferred back to another department. *Id.* Mr. Daniels was not aware of Claimant being hurt while under his supervision. *Id.*

Mr. Daniels also gave a deposition on October 27, 2005.<sup>8</sup> EX 6. On direct examination, he testified that he was a plumbing supervisor and had supervised Claimant. *Id.* at 10, 16. He stated that he prepared a statement regarding Claimant, as requested by KBR safety personnel, and that it was accurate and written in his own words. *Id.* at 12-13.

Mr. Daniels said that Claimant complained of his knees bothering him. EX 6 at 17. He stated that for the few weeks Claimant worked for him, he was out two or three times for different ailments, including stiffness in his legs, an inability to walk well, and foot problems. *Id.* at 18. According to Mr. Daniels, Claimant never told him that he was injured while working for Employer. *Id.* He stated that if an employee was injured, the foreman and supervisor were supposed to be informed. *Id.* He testified that he was never informed of any injuries sustained by Claimant or asked to fill out an accident report involving Claimant. *Id.* at 19.

Mr. Daniels stated that when Claimant returned from R&R in January 2005, Claimant was transferred to another department. EX 6 at 19-20. He testified that he saw Claimant afterwards, and that Claimant said his knees were still bothering him. *Id.* at 20. Mr. Daniels further testified that he no longer works for KBR and that nobody from that company asked him to testify. *Id.* at 21.

On cross-examination, Mr. Daniels testified that he was Claimant’s supervisor for approximately three to four weeks. EX 6 at 21. He stated that while under his supervision, Claimant missed “three days, roughly, in the month that I was there.” *Id.* at 23. He said that he determined Claimant was taking legitimate days off and not “jerking” him around because Claimant had a slight limp. *Id.* at 24. Mr. Daniels stated that he assumed Claimant “had arthritis in his knees, or some ailment that he had to deal with,” but was never told that by Claimant. *Id.*

When asked about Claimant’s prior injuries, Mr. Daniels stated that “[Claimant] had evidently been hurt, or had some kind of physical ailment because of the way he hauled around, and the days he was out, and I inquired, and he spoke of a ditch cave-in that he had, and a motorcycle accident he had prior to Afghanistan.” EX 6 at 25. He stated that the ditch cave-in was pretty bad, as Claimant “spoke of it being on the verge of being life-threatening.” *Id.*

Mr. Daniels stated that there was a bad flood in Kandahar in December, 2004, and his staff, including Claimant, had to pump out the water. EX 6 at 26. He testified that he had no recollection of Claimant slipping while operating the pumps in connection with the flood. *Id.* He

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<sup>8</sup> The evidentiary record was held open after the hearing, in part to allow Employer/Carrier to locate four witnesses who had given statements with respect to Claimant’s allegations. EX 6 at 4. Charles Daniels is the only one of the witnesses who was successfully located. *Id.*

noted that because Claimant was not very “spry,” he let Claimant watch the pumps because “they were closer to the shop so he wouldn’t have to go out and then fight and push and pull on hoses and things.” *Id.* at 27.

On redirect examination, Mr. Daniels reviewed Claimant’s deposition testimony regarding the December, 2004 incident. EX 6 at 28. He then testified that he was not informed of any incident in December, 2004 in which Claimant twisted his knee. *Id.* He restated that since he was Claimant’s supervisor, he would have been notified if Claimant was injured. *Id.* at 30.

#### 5. Statement of Samuel Moore

Samuel Moore completed an “Accident/Incident Statement” on April 15, 2005. EX 4 at 120. He stated that he worked with Claimant at Kandahar Airfield in October, 2004; and that he injured his own knee shortly after Claimant’s arrival. *Id.* Mr. Moore stated that Claimant asked him about his knee, and that Claimant told him that he “had problems with his knee for years and at times had to have fluid removed...with a big needle.” *Id.* He stated that he told Claimant that ice worked well for his knee, and that Claimant then responded that he would try to use ice as well. *Id.* at 120-121.

### Medical Evidence

#### 1. Progress Notes from V.A. Medical Hospital in St. Cloud, Minnesota

Employer submitted “Progress Notes” from Claimant’s 2004 visits to the V.A. Medical Hospital in St. Cloud, Minnesota. EX 7. These visits occurred prior to Claimant’s employment with SEI, and were pursuant to Claimant’s attempt to complete paperwork for unemployment benefits. *See id.* According to one such note, completed by James Stuart, LPN, on June 4, 2004, Claimant “apparently had been dismissed from his job after requiring three days of convalescence due to right knee swelling that incurred [sic] after walking extensive distance[s] at his place of employment.” *Id.* at 30. The note also states that Claimant “claims in 1987 he was diagnosed with osteoarthritis in California,” but that he declined X-rays to validate the diagnosis. *Id.* at 30-31.

Another note written by Harold Rasmussen, and dated June 2, 2004, says the following: “Vet states that he was working for a firm that required him to walk extended distances and his arthritic rt. Knee swelled up requiring him to take 3 days off from work. He was fired after missing the three days of work and now seeks to get unemployment insurance benefits.” EX 7 at 32. The third note, dated May 19, 2004 and written by Wulf Krause, states that Claimant sought unemployment benefits because he was fired from his job due to migraine headaches. *Id.*

#### 2. Medical Records of Dr. Charles P. Springer

A report dated March 7, 2005, prepared by Dr. Springer of the Orthopedic Specialists of SW Florida, explains that Claimant visited the doctor complaining of a work-related injury to his right knee. CX 4 at 1. According to the report, Claimant was “performing his regular duties on a base and walking on some uneven ground when he wrenched and twisted the knee.” *Id.* At the

time of the visit, Claimant complained of “limited motion of the knee, pain when he pivots, [and he] twists [it] or squats on it with frequent instability.” *Id.*

In terms of Claimant’s physical examination, Dr. Springer noted that Claimant is “walking with severe antalgia favoring the right side” and Claimant’s “limb lengths show a  $\frac{3}{4}$  limb length discrepancy with the left shorter than the right.”<sup>9</sup> *Id.* He stated,

[i]n terms of the right knee, [Claimant] does have a small effusion. [Claimant] has limited motion from 0-90 degrees. There is extreme discomfort in the knee with deep knee flexion. [Claimant] is point tender over the medial joint line. [Claimant] has a 1+ Lachman’s test with no firm end point. Negative pivot shift test. Acutely positive Apley’s test. Collaterals are stable at 0 and 30 degrees. Distally, he is neurovascularly intact.

*Id.* at 1-2.

Claimant’s X-rays revealed “no significant abnormality, good alignment and good preservation of the joint space with no fracture.”<sup>10</sup> *Id.* at 2. Dr. Springer’s impressions were as follows: “internal derangement right knee with possible partial ACL tear, and possible medical meniscus of the knee.” *Id.*; CX 7 at 6. The report shows that Dr. Springer directed Claimant to undergo an MRI, and then to come back for a second visit. CX 4 at 1.

This initial report by Dr. Springer also details Claimant’s past medical history, noting that Claimant has suffered from arthritis of his left hip as a result of a motorcycle accident in 2000. *Id.* at 1; CX 7 at 4. Claimant also underwent facial reconstruction surgery in July 2000 and hip surgery in 1987. CX4 at 2.

Following Claimant’s MRI on March 8, 2005, Dr. Springer met with Claimant a second time on March 10, 2005. *Id.* at 3-4. Dr. Springer noted in his report that the MRI “revealed an intact ACL.”<sup>11</sup> However, he also observed that Claimant has “a rather large oblique tear of the posterior horn of the medial meniscus.” *Id.* Claimant’s symptoms on this second visit to Dr. Springer included, “intermittent buckling, catching, and sharp pain along the medial side.” *Id.* The report states that Claimant “still has classic signs for meniscus tear including medial joint line tenderness and positive Apley’s. He has stable collateral ligaments and 1+ Lachman’s with no firm end point compared to the left.” *Id.* Dr. Springer discussed treatment options with

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<sup>9</sup> In a later deposition, Dr. Springer testified that the leg length discrepancy is “consistent with arthritis of the hip. CX 7 at 5.

<sup>10</sup> The X-rays included three views that were taken during Claimant’s March 7, 2005 visit to Dr. Springer. CX 4 at 2.

<sup>11</sup> The MRI Report, dated March 8, 2005, is included in the record in Claimant’s Exhibit 4, pages 4-5. The MRI impressions are as follows: “(1) Oblique tear posterior horn of the medial meniscus; (2) No evidence [of] tear or sprain of the ACL; (3) Mild arthrosis medial compartment tibiofemoral joint; (4) Small joint effusion with 4.6 cm Baker’s cyst in the popliteal fossa.” In a later deposition, Dr. Springer noted that the “mild arthrosis” indicated in the MRI is arthritis and that a Baker cyst is “a fluid filled cyst in the back of the knee.” CX 7 at 6.

Claimant, and surgery was determined to be the next step. *Id.* Dr. Springer anticipated that Claimant could return to work “full duty” within 4-6 weeks after the surgery. *Id.*

Dr. Springer performed surgery on Claimant’s right knee on May 4, 2005. CX 4 at 6. The performed procedures included “right knee arthroscopy,” “partial medial meniscectomy” and “a thermal shrinking of the ACL with a notch chondroplasty.”<sup>12</sup> *Id.* The operative report describes the relevant findings as “an intact patello femoral joint with normal tracking and no articular cartilage defect” and “an acute oblique tear of the posterior horn of the medial meniscus back to the posterior capsule” with a radial flap component. *Id.* at 6-7.

Following surgery at the Lee Island Coast Surgery Center, Claimant was discharged and ordered to undergo physical therapy. *Id.* at 7, 10. Dr. Springer reported an “excellent” prognosis for Claimant, and indicated that Claimant has no specific limitations. *Id.* at 10. Claimant was cleared for work by Dr. Springer as of June 2, 2005. *Id.* Dr. Springer was aware that Claimant was returning to a job with “physical and psychological requirements,” and in an area “with limited medical assistance.” *Id.*

Dr. Springer was first deposed on September 12, 2005. CX 7 at 1. He testified that he had never seen Claimant for problems with his knee prior to March 7, 2005; and that as far as he knew, Claimant never had any problems with his right knee before his reported December 27, 2004 injury. *Id.* at 3-4. When asked by Employer’s attorney about the finding of arthritis in Claimant’s knee, which was indicated in the MRI report, Dr. Springer said that arthritis could be related to the two work-related incidents that caused Claimant’s knee injury. *Id.* at 6. He said that “[a]rthritis can be multi-factorial. Post traumatic is one of the reasons it can happen.” *Id.* He went on to explain that “[a]ny trauma can damage the cartilage of the joint and, therefore, can precipitate arthritis.” *Id.* at 6-7. Dr. Springer testified that arthritis could have developed in Claimant’s knee between the initial injury on December 27, 2004 and the finding of arthritis on March 8, 2005. *Id.* at 7. Dr. Springer further testified that the two incidents which Claimant alleged caused his right knee injury could have been the precipitating causes of Claimant’s partial ACL tear. *Id.* at 8. According to Dr. Springer, a [s]imple twist, stepping on uneven surface could do it.” *Id.* Dr. Springer said that trauma is needed in order to have a partial ACL tear. He said that the surgery was a success.

Dr. Springer testified that his opinions of the work-relatedness of Claimant’s right knee condition were dependent upon the truth of the history given to him by Claimant. *Id.* at 9. He stated that when he physically examined Claimant’s knee, there was no physical evidence of Claimant having undergone any prior procedures on his knee. *Id.* at 9-10. He said that such evidence (i.e. scarring) of prior procedures is something he would ordinarily be able to see. *Id.* at 10.

Dr. Springer was asked by Claimant’s attorney if Claimant, with the condition of his knee, could have performed physical labor, for twelve hour days seven days a week in Afghanistan (being on his feet all day, traveling to remote locations in Afghanistan in all kinds of weather and lifting heavy equipment). *Id.* at 11. Dr. Springer answered that “the nature of a

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<sup>12</sup> The postoperative diagnosis was a medial meniscus tear of Claimant’s right knee and a partial tear of his ACL. CX 4 at 6.

meniscal tear and an ACL tear is that some basic functions could be continued. You can still walk. But in order to navigate uneven terrain, to twist, turn, quick stops, change of direction, high altitude, climbing, those sort[s] of things are dangerous with those injuries....I would anticipate he would not be able to perform those activities.” *Id.*

In a report dated September 12, 2005, Dr. Springer noted that Claimant had reached maximum medical improvement as of June 2, 2005. CX 5. He gave Claimant impairment ratings of 4% for his whole body and 9% for his right leg, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Page 85, Table 64.<sup>13</sup> CX 5.

Dr. Springer wrote a follow-up letter, dated December 19, 2005, in response to the June 4, 2004 “Progress Note” from the V.A. Hospital.<sup>14</sup> CX 11. In his letter, Dr. Springer stated that the V.A. Hospital evaluator’s examination of Claimant was “very limited and ... did not evaluate the joint for any ligamentous laxity or meniscal pathology. In addition, the history makes no mention of any symptomatic instability of his knee.” *Id.* Dr. Springer also expressed his disagreement with Dr. John White’s amended medical opinion that based on the above-mentioned Progress Note, Claimant likely had a pre-existing condition in his right knee. *Id.*; EX 8 at 6. He stated,

[a]t no time prior to his injuries in Afghanistan in 12/04 and 2/05 did the patient complain of instability. Following his injuries in Afghanistan, the patient had significant buckling and instability with occasional locking of the knee. Arthroscopy of the joint was done, which revealed a partial ACL tear and a large posterior horn medial meniscus tear, but there was no significant osteoarthritis noted....Given that the patient had significant symptomatology directly following his injuries in Afghanistan, I believe within reasonable medical certainty that his medial meniscus tear and partial ACL tear were a result of trauma from 12/04 and 2/05.

*Id.*

### 3. Medical Records of Dr. John A. White, Jr.

Dr. John A. White, an orthopedic surgeon hired by Employer, examined Claimant on October 26, 2005. Ex. 8. Dr. White’s initial report contains essentially the same description as provided by Dr. Springer, and as testified to by Claimant, regarding Claimant’s December 27, 2004 and February 9, 2005 incidents that led to his injury. *Id.* at 2. *Compare* CX 4 at 1 and Tr. 34-40. Dr. White wrote that “Dr. Springer’s initial evaluation dated March 7, 2005, notes the examinee had limited motion from zero (0°) to ninety degrees (90°) of flexion which somewhat contradicts the examinee’s statement [to Dr. White] in that he was unable to totally extend his

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<sup>13</sup> Dr. Springer amended Claimant’s whole body impairment rating to 4%, from the 2% rating he had previously noted. CX 5.

<sup>14</sup> Both the V.A. “Progress Note” and Dr. White’s response were received and reviewed by Dr. Springer after he wrote his other reports and gave his deposition. CX 11.

knee.” EX 8 at 2. Dr. White also noted that Claimant “categorically denies having had any problems or complaints with reference to his right knee” prior to the work-related incidents in December, 2004 and February, 2005. *Id.* at 3. Dr. White further stated,

Of note the examinee states that approximately six months prior to the work injury, he did give up jogging where I was unable to determine the particular cause and he has not wind surfed since the injury nor had he wind surfed up to approximately six months prior to the work related injury.<sup>15</sup>

*Id.*

In regards to his physical examination of Claimant’s right knee, Dr. White noted the following:

[There were] well healed small puncture scars [from the surgery] noted over the anterior, medial, lateral and superpatella region of the right knee. There was full range of motion from zero (0°) to one hundred-thirty-five degrees (135°) of knee flexion. There were no signs of significant effusion....There were no signs of discomfort or crepitations on patella femoral compression. There was no evidence of significant medial lateral joint line tenderness. There was no palpable or appreciable popliteal cysts.

*Id.* at 4.

Dr. White concluded his report, noting that “any type of intraoperative documentation...,” which he was not privy to, would be helpful to know the extent of “cruciate ligamentus involvement” as a result of Claimant’s work-related injury. *Id.* at 5. Based on Dr. Springer’s description in his post operative report, and “assuming the laxity that was present is entirely related to the work related injury,” Dr. White gave Claimant impairment ratings of three percent (3%) for his whole body and seven percent (7%) for his right leg. *Id.*

After Dr. White’s examination of Claimant, he received and reviewed Progress Notes from Claimant’s visits to the V.A. Hospital in Minnesota in June, 2004 (EX 7). EX 8 at 5. Consequently, Dr. White submitted an addendum to his report dated November 4, 2005, in which he changed his previous opinion. *Id.* Dr. White noted that the new evidence “which clearly contradicts the history that was provided to [him] by [Claimant] that he had no significant problems with his right knee or had ever been treated for any significant problems to his right knee in the past is quite disturbing.” He further noted:

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<sup>15</sup> It is noted by the Court that six months prior to Claimant’s work-related injury was approximately the time Claimant visited the V.A. Hospital in Minnesota, stating that he was dismissed from work due to a swollen right knee. *See, e.g.*, EX 7 at 1.

[A]ssuming the December 27, 2004 and February 9, 2005 incidents did not occur, it would appear there was a pre existing injury prior to the December 27, 2004 and February 9, 2005 alleged incident that occurred while [Claimant] was in Afghanistan. Therefore, it is probable that [Claimant's] torn meniscus and partially torn ACL preexisted his employment with Service Employees International Inc., which I understand began in October 2004. Based on the medical records, it is probable that [Claimant] had these conditions at least as early as June 2004. I note in this regard that some patients are able to function with a torn meniscus and partially torn ACL for a long while before deciding to undergo surgery.

*Id.* at 6.

#### IV. DISCUSSION

Claimant bases his claim for disability and medical benefits under the Act on two work-related incidents which he alleges caused injury to his right knee. The first allegedly occurred on December 27, 2004, while Claimant was operating equipment in an effort to control flooding. *See, e.g.*, Claimant's Post-Hearing Brief ("Cl. Br.") at 4. The second injury allegedly occurred on February 9, 2005; again to his right knee and in substantially the same way. *Id.* The evidence Claimant offers in support of his claim consists of his own testimony and the medical records of Dr. Charles Springer. The evidence Employer offers consists of the statements of several of Claimant's co-workers, records from the V.A. Medical Clinic in St. Cloud, Minnesota and the medical records of Dr. John A. White, Jr. As explained below, I do not find that Claimant has proven the work-relatedness of his injury by a preponderance of the evidence, and, consequently, will deny his claim for benefits.

##### Injury Arising Out of<sup>16</sup> and In the Course of<sup>17</sup> Employment

As a preliminary matter, I find that Claimant has presented a claim based on an initial injury theory alone; and that an alternative theory of aggravation does not apply here. Nowhere in the record did Claimant ever assert that a pre-existing knee injury may have been aggravated during his employment with SEI. Rather, Claimant's case rests exclusively on repeated

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<sup>16</sup> The "arising out of employment" language of the LHWCA refers to the causal connection between the claimant's injury and an employment-related risk. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Whether an injury arises out of one's employment refers to the cause or the source of the injury, *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981), and the necessary causative nexus is established when there is "a causal relationship between the injury and the business in which the employer employs the employee--a connection substantially contributory though it need not be the sole or proximate cause." *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423-24 (1923).

<sup>17</sup> "In the course of employment" refers to the time and place of the injury, as well as the activity in which the claimant was engaged when the injury occurred. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1981) (as the claimant was injured on the work premises during working hours, the injury occurred within the time and space boundaries of the employment).

allegations that his knee injury was caused in two separate incidents while working for Employer, and that he had no pre-existing problems with either of his knees.

The first and only time that Claimant ever suggested that aggravation is an issue in this case is in his post-hearing brief. In the brief, Claimant, through his attorney, states, without elaboration, that “the existence of a pre-existing knee condition, *arguendo*, poses no impediment to [Claimant’s] claim, since [under the Act] any disabling condition that is caused by, or aggravated by, a work-related injury is compensable.” Cl. Br. at 8. He goes on to state that “[a]ssuming the existence of a pre-existing condition in [Claimant’s] right knee, it is absurd to conclude that such a condition would not have been aggravated by the hard manual labor that [Claimant] performed while in Afghanistan.” *Id.*

In contrast to his belated and untimely attempt to now assert a claim based on aggravation, Claimant’s attorney stated during his opening statement at the September 21, 2005 hearing that “[Claimant] will forthrightly deny all [allegations that his injury was preexisting]” and “that he had any prior problems with either of his knees.” Tr. at 16. Claimant’s attorney went on to state that “I think most conclusively, there’s no records or any evidence whatsoever of any prior treatment or any prior problems with [Claimant’s] knee.” Tr. at 17. In addition, throughout the hearing and in pre-hearing depositions, Claimant repeatedly testified that he had no pre-existing knee problems.<sup>18</sup>

In *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483 (1981), the Board held that an aggravation theory could not be argued by a claimant when it was not advanced in the hearing before the administrative law judge. It was specifically rejected by the Board as a basis for potential liability at the appellate level. *Id.* at 485. The Board wrote:

Claimant was represented by competent counsel who clearly articulated a different theory of causation and recovery in the hearing below. Therefore, claimant may not raise the issue as to aggravation for the first time on appeal.

*Ibid.*

Here, as noted above, aggravation was never asserted as a theory of liability in the record prior to Claimant’s post-hearing brief. Indeed, Claimant’s repeated assertions, and the statements of his attorney, that Claimant had no pre-existing knee problems were specific

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<sup>18</sup> For example, in Claimant’s pre-hearing deposition, he stated that up until the incidents that are the subject of this claim, he never had any problem with his legs. EX 5 at 18. He also stated that prior to the KBR employment, “I have never been diagnosed or had any problems with either of my legs, except with the exception of my left hip.” EX 5 at 54. More specifically, he stated that he had never had problems with either of his knees. *Id.* at 55. At the hearing, Claimant testified that he never injured either of his knees at any time prior to December of 2004. Tr. at 27. He also stated that “I have never been diagnosed nor have I been seen by any medical professional about my knees ever...prior to December of 2004.” *Id.* In addition, he stated that he never experienced arthritis in his right knee prior to December of 2004. *Id.* Moreover, he stated that he never told anyone in Kandahar, Afghanistan, or anyone outside that location, that he had chronic knee pain in either one of his knees. *Id.* at 66. Finally, in his post-hearing deposition, he reiterated that “prior to December of 2004...I haven’t had any diagnosis or any kind of reason to go and see a medical professional for either one of my knees. CX 12 at 27.

rejections of aggravation as a basis for his claim. As was the case in *Levesque*, Claimant “was represented by competent counsel who clearly articulated a different theory of causation and recovery in the hearing . . . .” Having done so, he is not entitled to belatedly assert a new theory of recovery at this juncture of the proceedings.

With regard to this issue, I note the Board has previously acknowledged that, “[u]nder 20 C.F.R. § 702.336, an [ALJ] *may* allow parties to raise new issues at the hearing, or even post-hearing, provided that . . . the other parties are given notice of the issue and time to respond to it, *but he is not required to do so.*” *Emery v. Bath Iron Works Corp.*, 24 BRBS 238, 242 (1991) (emphasis added). The referenced regulation provides, in relevant part:

At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue. The parties shall be given not less than 10 days’ notice of the hearing on such new issue. The parties may stipulate that the issue may be heard at an earlier time and shall proceed to a hearing on the new issue in the same manner as on an issue initially considered.

20 C.F.R. § 702.336(b). The facts of this case do not warrant reopening the record and conducting a supplemental hearing for such purpose.

As noted above, Claimant and his counsel elected at the formal hearing to proceed exclusively in this matter under the theory that Claimant first sustained an injury to his right knee during his employment with SEI, expressly eschewing any claim that Claimant had a pre-existing right knee condition which was aggravated by such employment. Thereafter, counsel merely mentioned in his closing brief, without any explanation, cited legal authority, or argument, aggravation as a possible alternative theory of liability. Considering the issue now without re-opening the record and giving notice to Employer would clearly deprive Employer of its right to due process inasmuch as Employer was never previously given notice of the issue or an opportunity to gather and submit evidence rebutting aggravation. Nor would it be appropriate to postpone a decision in the case now for the several months it would take to re-open the record, order the parties to further develop the evidentiary record, conduct a second hearing, review the record, and decide the claim. For all these reasons, I find that Claimant has failed to properly raise aggravation as an issue in this case, and I will, therefore, address only the issue of whether Claimant sustained an initial injury arising out of, and in the course of, his employment.

#### The 20(a) Presumption

According to Section 20(a) of the LHWCA, “[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act.” 33 U.S.C. § 920(a). “Section 20(a) . . . provides claimant with a presumption that his injury is causally related to his employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm.”

*Uglesich v. Steverdoring Servs. of Am.*, 24 B.R.B.S. 180, 182 (1991) (citing *Blake v. Bethlehem Steel Corp.*, 21 B.R.B.S. 49 (1988)).

Once the claimant establishes these elements of a *prima facie* case, the Section 20(a) presumption applies to link the harm with the claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). This statutory presumption applies to the issue of whether an injury arises out of and in the course of employment. *Travelers Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955) (citing *O'Leary v. Brown-Pacific Maxon, Inc.*, 340 U.S. 504 (1951)). It is grounded in the humanitarian purpose of the LHWCA, favoring awards in arguable cases. *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

The Section 20(a) presumption does not apply, however, to aid the claimant in establishing his *prima facie* case. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). See *U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A..T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). Therefore, like any other element of his case to which a presumption does not apply, the claimant has the burden of establishing harm, and the existence of an accident that could have caused his harm, by a preponderance of the evidence. In other words, before availing himself of the Section 20(a) presumption, Claimant must establish that the incidents claimed to be the cause of his injury in fact occurred.

Once the claimant has established a *prima facie* case, thus invoking the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davidson v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with the claimant bearing the burden of persuasion. See, e.g., *Meehan Service Seaway Col. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT) (8<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Applying this law to the instant case, I find that Claimant is not entitled to the 20(a) presumption because he has failed to present a *prima facie* case. As stated above, a *prima facie* case under the Act has two prongs; and Claimant has only satisfied the first. To meet the first prong, a claimant must show that he suffered harm or pain. Here, Claimant has clearly shown he

suffered pain while working for Employer; albeit, perhaps from a pre-existing injury.<sup>19</sup> Claimant testified that he left Afghanistan because his knee condition left him unable to perform his job, and he returned to the U.S. for medical treatment. Tr. at 42. In addition, several of Claimant's co-workers at SEI stated that Claimant complained to them about knee problems while he was in Afghanistan. *See, e.g.*, EX 4 at 116, 117. Accordingly, I find that Claimant has established he suffered harm to his right knee and has satisfied the first prong of the 20(a) presumption.

It is the second prong which Claimant fails to meet. Here, Claimant bases his claim for benefits solely on two alleged incidents, which he claims caused injury to his right knee, thereby disabling him. *See supra* pp. 3-4. In addition, he asserts that prior to the first incident, he never had any problems with either of his knees. *See supra* note 18 and accompanying text. He alleges that the first incident occurred on December 27, 2004. *See supra* p. 3. The second allegedly occurred on February 9, 2005. *See supra* p. 4. Thus, in order to satisfy the second prong of a *prima facie* case, Claimant must establish by credible evidence that the alleged incidents did in fact occur and that they could have caused his harm. He has not done so. His own testimony of the alleged incidents is the only proof Claimant has offered, and, as explained further below, I find that his testimony is not credible. In addition, Claimant's medical expert, Doctor Springer, admitted that his opinion of the work-relatedness of Claimant's injury was based upon the medical history that Claimant reported to him. *See supra* p. 13. Since I find that Claimant is not a credible witness, having admitted to lying numerous times—most notably in a fabricated claim for benefits, *see infra* note 23 and accompanying text—I find that the alleged incidents have not been established. Thus, Claimant has failed to present a *prima facie* case and is not entitled to the 20(a) presumption.

### Employer's Rebuttal

Even if it were assumed that Claimant is entitled to the 20(a) presumption,<sup>20</sup> the presumption has been successfully rebutted by Employer. As noted above, once the claimant has invoked the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25

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<sup>19</sup> The Court notes that an injury is sustained where a claimant has experienced some harm or pain. *See Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968 (*en banc*)). The claimant's burden does not include establishing an injury as defined in Section 2(2) of the LHWCA. It has been held that to place such a burden on the claimant would be contrary to the well-established rule that the Section 20(a) presumption applies to the issue of whether an injury arose out of and in the course of employment. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 at 329. In addition, an injury need not be traceable to a definite time, but can occur gradually over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

<sup>20</sup> The Court notes that a relatively low threshold exists for establishing a *prima facie* case. *See Conoco, Inc. v. Director, OWCP*, 33 BRBS 187 (CRT) (1999) (noting that inconsistencies in a claimant's statements "will not undermine automatically the relatively light burden of establishing a *prima facie* case"). In *U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." 455 U.S. 608 at 615 (1982) (emphasis added). In *Dangerfield v. Todd Pacific Shipyards Corp.*, for example, the Benefits Review Board found that the claimant satisfied this requirement of U.S. Industries by asserting that she sustained a low back injury which was caused by a fall at work. 22 BRBS 104 (1989).

BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davidson v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). Substantial evidence is “the kind of evidence a reasonable mind might accept as adequate to support a conclusion.” *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1<sup>st</sup> Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959). Here, Employer has produced such evidence to successfully rebut the presumption that Claimant’s right knee injury arose out of and in the course of his employment with SEI.

In response to Claimant’s allegations that he injured his right knee in two incidents while working for Employer, and that he had never received previous medical attention for, or had any problems with his knees, Employer has provided substantial evidence to establish that Claimant had a pre-existing right knee condition. Of critical importance are Claimant’s medical records, produced by Employer, from the V.A. Hospital. The records reveal that Claimant told the hospital in June, 2004 that he “had been dismissed from his job after requiring three days of convalescence due to right knee swelling that incurred after walking extensive distance at his place of employment.” EX 7 at 30. Also significant are the statements from Claimant’s co-workers at SEI that he had complained of chronic knee-pain soon after arriving in Afghanistan.<sup>21</sup> See, e.g., EX 4 at 104, 120-121. In addition, Employer produced evidence revealing that when Claimant received treatment from Employer’s medical staff four days after the alleged December, 2004 incident, Claimant complained of chronic knee problems and never mentioned a fall or injury during the course of his employment with SEI. EX 4 at 109. Since a reasonable mind might accept this evidence as adequate to support the conclusion that Claimant had a right knee condition prior to his employment with Employer, the Section 20(a) presumption has been rebutted with respect to whether Claimant first sustained a work-related injury to his knee while working for SEI.<sup>22</sup>

### Weighing the Evidence

As previously stated, and if the Section 20(a) presumption were to have been invoked in this case, once the presumption is overcome by the introduction of substantial evidence, the fact-finder must evaluate all of the evidence and reach a decision based on the record as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Glover v. Aerojet-General Shipyard*, 6 BRBS 559 (1977); *Norat v. Universal Terminal & Stevedoring*

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<sup>21</sup> In *Sinnot v. Pinkerton’s Inc.*, the court held that the testimony of a claimant’s two former co-workers indicating that the claimant had a noticeable tremor in his hand even prior to his fall at work was sufficient to rebut the presumption of causation where the claimant never raised an aggravation theory. 14 BRBS 959 (1982), *rev’d and remanded mem.*, 744 F.2d 878 (D.C. Cir. 1984).

<sup>22</sup> In addition, it has been held that a combination of medical testimony, a credibility determination, and negative evidence (i.e. no medical record in union clinic or hospital books of Claimant slipping or suffering pain) constituted sufficient evidence to rebut the presumption of causation. *Craig v. Maher Terminal*, 11 BRBS 400 (1979). In the instant case, the same combination of evidence is provided by Employer. There is medical testimony from Dr. White that Claimant’s injury probably preexisted his employment, see *supra* p. 16; Claimant’s testimony has been found to be unworthy of credibility, see *infra* pp. 21-22; and there is no evidence in Employer’s clinic records of Claimant complaining of either alleged incident (although there are records of Claimant complaining of chronic knee pain), see, e.g., EX4 at 109; Tr. at 70.

*Corp.*, 3 BRBS 151 (1976). The presumption no longer affects the outcome of the case. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). See *Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

Here, Claimant alleges that he injured his right knee as a result of two incidents at work. He testified that he was on flood control duty both times, lifting equipment on rocky terrain, when his knee “popped.” See, e.g., Tr. at 41. According to Claimant, after the second incident, he could no longer perform his job duties due to his injury. *Id.* Claimant is the only person who can attest to these alleged incidents. Employer has records concerning Claimant’s “chronic knee pain,” but has no records indicating that Claimant ever reported either alleged incident. Additionally, there is no evidence that any other employee observed the alleged incidents. Moreover, Claimant’s medical expert, Doctor Springer, admitted that his opinions of the work-relatedness of Claimant’s right knee condition are wholly dependent upon the history given to him by Claimant. CX 7 at 9. Thus, to determine whether either incident actually occurred, Claimant’s own testimony is all that can be considered. While Claimant provided the same account of both incidents in his pre-hearing deposition and at his hearing, I do not find him to be a credible witness for several reasons.

First, Claimant admitted numerous times during the course of the hearing that he had been untruthful in the past. Notably, Claimant admitted that he lied in the recent past in an attempt to get unemployment benefits. CX 12 at 21. Of particular importance to this claim is the fact that, when he sought unemployment benefits in 2004, he claimed that his “swollen right knee” was the reason he was discharged by his prior employer. *Id.* at 14-15. Claimant testified that he fabricated the story because he was “unemployed and broke,” and that it was difficult to find jobs in his line of work at that point. *Id.* at 21. Whether his right knee was injured or not in 2004, the fact that Claimant admittedly invented a story to receive unemployment benefits in the recent past substantially undermines his credibility in this case.<sup>23</sup>

Claimant further conceded that he has been untruthful in other regards. For example, when asked at the hearing on cross-examination about the reason he left a previous employer, he initially testified that he stated in his employment application that his reason for leaving was that the “company outsourced production,” although, when pressed, he confessed the real reason he left was that he failed to report to work. CX 12 at 11-13. Claimant also admitted that he lied again when he told a staff person at the V.A. hospital in May, 2004 that he was fired by that employer for missing work due to migraine headaches. *Id.* at 14, 17. Similarly, Claimant

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<sup>23</sup> Additionally, the fact that Claimant’s fabrication happened to concern his right knee, when the present case also involves Claimant’s right knee, seems more than coincidental.

admitted that he was fired by U.S. Bank Corporation, another employer, when it was discovered that he failed to reveal on his employment application that he had a prior arrest for driving while intoxicated. Tr. 77. Claimant further acknowledged that he lied on his employment application submitted to SEI for his job in Afghanistan when he stated that he left U.S. Bank Corporation for “higher wages.” Tr. 79. Given Claimant’s admitted penchant for lying when doing so provides some financial incentive, I give his statements regarding his alleged December 2004 and February 2005 injuries little weight.

The only other evidence supporting Claimant’s assertion that he sustained injuries to his right knee while working for SEI in Afghanistan is from Dr. Springer. Although Dr. Springer diagnosed an oblique tear of the posterior horn of the medial meniscus after Claimant returned to the United States from Afghanistan, and performed arthroscopic surgery on Claimant’s right knee on May 4, 2005 to correct the medial meniscus tear and a partial tear of the ACL, CX4 at 3, 6, he testified that his attribution of Claimant’s injuries to his employment with SEI was wholly dependent upon the truth of the history given to him by Claimant. CX 7 at 9. Since I find Claimant’s testimony concerning the events of December 27, 2004 and February 9, 2005 to be not credible, I further find that Dr. Springer’s opinion concerning the cause of Claimant’s right knee disability is not supported by the evidentiary record.

In contrast to Claimant’s questionable description of his alleged injuries, Employer has offered persuasive evidence that Claimant’s right knee condition pre-existed his employment with SEI and was not the result of any injury sustained while working for SEI. In contradiction to Claimant’s repeated contentions that he had never been diagnosed with, nor sought medical treatment for, any knee problems, *see, e.g.*, CX 12 at 27; Tr. at 51; CX 12 at 8, 27, Employer produced statements and records from several of Claimant’s co-workers showing that Claimant had told them of his chronic knee problems. EX 4. An email from Larry Dolence stated that on December 31, 2004, only a few days after Claimant’s alleged first injury, Claimant asked for medication for chronic knee pain and did not mention any fall or injury. *See* EX 4 at 109. That same email stated that Claimant sought medical attention again on February 6, three days before Claimant’s alleged second injury, for chronic knee pain.<sup>24</sup> *Id.* An “Incident Report” form completed by an SEI physician’s assistant on the same day Claimant was allegedly injured for the second time, made no mention of Claimant’s alleged incident that day—it mentioned only Claimant’s self-reported “preexisting condition of chronic arthritis in his right knee.” *See* EX 4 at 105. Moreover, Randy Daniels, Claimant’s supervisor when Claimant first began working in Afghanistan, explained that if an employee is injured, he must report the incident to his supervisor. EX 6 at 18. He further testified Claimant never reported any injury to him. EX 6 at 18.

In addition to the statements provided by other SEI employees, V.A. medical records indicate that Claimant complained about “right knee swelling,” and claimed “in 1987 he was diagnosed with osteoarthritis in California.” EX 7 at 1. VA medical records reviewed by Dr.

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<sup>24</sup> Claimant conceded that he was given anti-inflammatory medication on February 6, 2005. Tr. at 66. He denied telling the medic that he had chronic knee pain. *Id.* at 66. However, he acknowledged that he stated in his original deposition that he had made a complete recovery from his December 2004 knee injury before he injured the same knee again. Tr. at 64-65.

White also show that a June 2, 2004 progress note by James Stewart, an LPN at Waite Park, Minnesota, noted “multi joint discomfort *with emphasis on the right knee.*” EX 8 at 6 (emphasis added). Moreover, Dr. White, Employer’s medical expert, stated that “based on the medical records, it is probable that [Claimant’s] torn meniscus and partially torn ACL preexisted his employment with Service Employees International Inc;” and that “some patients are able to function with a torn meniscus and partially torn ACL for a long while before deciding to undergo surgery.” EX 8 at 7.

I thus find that Claimant has failed to prove by a preponderance of the evidence that he sustained an injury while working for Employer which would entitle him to an award of disability compensation or medical benefits under the Act. Since Claimant is not entitled to compensation under the Act, the issue of Claimant’s average weekly wage is moot.

### **ORDER**

It is hereby ordered that the claim of J.M.C., Jr. for disability and medical benefits under the Act is denied.

**A**

STEPHEN L. PURCELL  
Administrative Law Judge

Washington, D.C.